No. 85-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

LUZ MARINA CARDOZA FONSECA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF RESPONDENT

E. EDWARD BRUCE*
CAROL FORTINE
CARLOS M. VAZQUEZ
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

**Counsel of Record*

July 14, 1986

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES:

INTEREST OF AMICI CURIAE[1/]

The International Human Rights Law Group ("the Law Group") is a non-profit organization incorporated in 1983 in the District of Columbia that seeks to promote the observance of international human rights by providing pro bono legal assistance and information, representing clients before international fora, and participating as amicus curiae in litigation. The Law Group represents the National Council of Churches in cases currently pending before the Inter-American Commission on Human Rights concerning the treatment of Haitian and Salvadoran refugees.

The Washington Lawyers' Committee for Civil Rights Under Law is the Washington,

---

1/ Petitioner and respondent have given their written consent to the filing of this brief.

D.C., affiliate of the Lawyers' Committee for Civil Rights Under Law. That Committee was organized in 1963, at the request of President Kennedy, to involve private attorneys in the national effort to assure equal rights for all members of society. The national and Washington Lawyers' Committees have long provided volunteer legal representation to individuals claiming unlawful discrimination and other invasions of civil rights. In 1978, the Washington Lawyers' Committee established an Alien Rights Project to represent noncitizens who fear persecution if returned to their homelands.

Amici curiae offer this brief primarily to focus upon the legislative history of relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq. ("INA"), as amended by the Refugee Act of 1980.

STATEMENT OF THE CASE

Background. This case requires the Court to determine whether persons who believe for good reasons that they would be persecuted in their native lands are "refugees" within the meaning of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (hereinafter "INA"), and thus are eligible to apply for entry into the United States or, if already here, to seek asylum or permanent resident status.

Section 101(a)(42) of the INA defines "refugees" as all aliens who are "unwilling" to return to their native countries "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). This definition of "refugee" was added to the INA by the

Refugee Act of 1980, P.L. 96-212, 94 Stat. 103, to ensure that U.S. immigration statutes reflect our treaty commitments and domestic policy to "welcom[e] the oppressed of other nations."2/

For the same reasons, the term "refugee" was incorporated into three new sections of the INA added in 1980: Section 207, 8 U.S.C. § 1157, which permits the Attorney General to admit refugees into the United States; Section 208, 8 U.S.C. § 1158, which gives him the discretion to grant asylum to refugees already in the United States or at its borders; and Section 209, 8 U.S.C. § 1159, which allows him to adjust the status of

---

2/ See INS v. Stevic, 467 U.S. 407, 426 n.20 (1984), (quoting H.R. No. 96-608, 96th Cong., 1st Sess. 17-18 (1979)).

refugees granted asylum under Section 208 to permanent residents.

Proceedings Below. This case began with the request by Luz Marina Cardoza Fonseca for asylum pursuant to Section 208 of the INA. Ms. Cardoza Fonseca testified in proceedings before the Immigration and Naturalization Service ("INS" or "Service") that she holds political opinions opposed to the Sandinista regime in Nicaragua and that she believes her opinions are known to that regime because of her relationship to her brother. Respondent's brother had renounced his affiliation with the Sandinista movement and had publicly criticized its progression towards communism before coming to the United States and applying for asylum. Respondent testified that she fears the Sandinistas will now persecute her to retaliate against her brother or to

extract information which the Sandinistas believe he may have told her. Respondent further testified that her sister, who continues to live in Nicaragua, has advised her that it is too dangerous for respondent to return to that country.

The INS rejected respondent's testimony as insufficient. It took the position that, in order to have a "well-founded fear" of persecution and thus to qualify as a "refugee" who can seek asylum under Section 208, respondent must show a "clear probability" of persecution -- i.e., that it is more likely than not that she would be persecuted in Nicaragua.

The Service did not extract this "clear probability" standard either from Section 101's definition of "refugee" or from Section 208. Instead, it relied on cases decided under Section 243(h) of the Act, 8 U.S.C. § 1253(h). That provision

does not apply to "refugees," but instead bars the deportation of "aliens" to countries where their "li[ves] or freedom would be threatened."

The Ninth Circuit reversed. Cardoza Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986). In accordance with its earlier holding in Bolaños Hernández v. INS, 767 F.2d 1277 (9th Cir. 1985), and those of other circuits,[3/] the court held that aliens' fears of persecution are "well-founded" if they have "good reason" to fear persecution, even if they cannot show a probability of persecution. The court

---

3/ Carvajal Muñoz v. INS, 743 F.2d 562 (7th Cir. 1984); Guevara Flores v. INS, 786 F.2d 1242 (5th Cir. 1986). See also Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984). Only the Third Circuit has sustained the position advocated by the INS here. Sankar v. INS, 757 F.2d 532 (3d Cir. 1985).

held that the plain meaning of the term "refugee" as someone with a "well-founded fear of persecution" requires "that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded." 767 F.2d at 1453.[4/]

4/ The INS District Director in Florida recently announced, with the apparent approval of the Department of Justice, that aliens fleeing Nicaragua would no longer have the burden of demonstrating that they would be persecuted; instead, the Service would have to prove that they would not be persecuted. See New York Times, April 17, 1986, page 1, column 1. In addition, the Department of Justice is reportedly drafting regulations that would impose the same burden on the INS for aliens claiming that they are fleeing other communist countries. See id. This apparent change in the Service's enforcement policy seems to be inconsistent with the INS's construction of the Act in this case and raises the question whether the writ should be dismissed as improvidently granted.

SUMMARY OF ARGUMENT

I. The Service's position that aliens seeking to establish "refugee" status by proving a "well-founded fear" of persecution must show that they are, in fact, likely to be persecuted in their homeland ignores the plain meaning of the terms of the INA and is based on a provision of the Act that does not use the terms "refugee" or "well-founded fear." This Court should not defer to such a construction of the Act, since it is based upon the INS's continued adherence to a position which predates the 1980 amendments to the Act and thus represents an unwillingness to change that position, rather than a contemporaneous construction of the statute. Moreover, the Service ignores the fact that its restrictive definition of "refugee" will reduce the number of aliens eligible for admission into the

United States as refugees. Finall , the INS's argument that a narrow interpretation of "refugee" and consequent restriction of asylum are necessary to avoid making redundant the Act's withholding-of-deportation remedy ignores the fact that the asylum remedy is discretionary whereas withholding of deportation is mandatory.

II. The legislative history of the 1980 amendments to the INA shows that Congress intended that the standard for establishing "refugee" status would be more generous than the one the Service proposes: (A) Congress did not intend to narrow the prior standard for establishing refugee status, which had consistently been interpreted to require only a showing of "good reason" or a "reasonable basis" for fearing persecution. (B) Congress intended to enhance the Attorney General's flexibility in addressing world refugee

problems, whereas the Service's proposed standard would narrow the class of aliens who could qualify as refugees. (C) Congress intended that the term "refugee" be interpreted in conformity with the United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137 ("U.N. Convention"); the negotiating history of the Convention establishes that a "refugee" is an alien with "good reason" or "reasonable grounds" for fearing persecution.

III. The Service's legislative history argument is misconceived: (A) Its contention that it is "inconceivable" that Congress could have intended a different standard for asylum than the one set forth in the INS's prior regulations ignores the fact that Congress mandated the "well-founded fear" test that the Service had previously rejected. (B) The Service's argument that

Congress ratified the prior asylum standard by virtue of its references to the prior regulations or to the term "asylum" plays upon the ambiguity of that term and ignores the fact that the term was frequently used as a synonym for refugee admissions or for adjustment of status, both of which had been more generously granted than "asylum" as defined in the prior regulations. (C) The Service's argument that Congress ratified prior judicial and administrative constructions of the "well-founded fear" standard as the equivalent of the "clear probability" standard is without merit because there was no consensus prior to 1980 that the two standards were equivalent.

ARGUMENT

I. THE PLAIN MEANING AND THE STRUCTURE OF THE INA CONTRADICT THE SERVICE'S POSITION.

"The starting point in every case involving construction of a statute is the language itself." Landreth Timber

Co. v. Landreth, 105 S. Ct. 2297, 2301-02 (1985).[5/] Thus, this Court has "no choice but to 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" Metropolitan Life Insurance Co. v. Massachusetts, 105 S. Ct. 2380, 2389 (1985).

The Service ignores these principles. It takes the position that the "well-founded fear of persecution" test embodied in the definition of "refugee" in Section 101(a)(42) of the INA and used in Sections 207-09 should be interpreted in precisely the same fashion as the quite different test of Section 243(h),

---

5/ See also United States v. James, 54 U.S.L.W. 5030, 5032-33, 5035 (U.S. July 2, 1986); Bowsher v. Merck & Co., 460 U.S. 824, 830 (1983); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982).

which requires aliens to prove that their "li[ves] or freedom would be threatened" if deported.

Understandably unwilling to argue that its reading of the statute can be sustained by the plain meaning of its terms, the INS instead argues that the Court should defer to the agency's construction (Petr. Br. 9-11); that Congress could not have intended to permit aliens to qualify as "refugees" under Section 101(a)(42), and thus to be eligible to apply for asylum under Section 208, if they are not also eligible for withholding-of-deportation under Section 243(h) (id. at 11-28); and that the use of a standard to grant asylum under Sections 101(a)(42) and 208 which differs from the standard used in Section 243(h) "would be administratively unworkable" (id. at 28-32).

Since the bulk of the Service's argument is devoted to an attempt to discern the intent of Congress on this issue, amici's brief will be directed to the legislative history of the statute and will show that, in equating the standard for withholding deportation under Section 243(h) with the standard for asylum under Sections 101(a)(42) and 208, the Service has misread Congress' intention. Before turning to the legislative history, however, we make the following points which we assume will be developed at greater length by respondent and by other amici supporting her.

A. The issue in this case is the definition of the term "refugee" set forth in Section 101(a)(42) of the Act and incorporated into Sections 207-209. Congress unmistakably indicated that it was not necessary for aliens to show that

they would actually be persecuted, since "refugee" was defined as including all aliens who are "unwilling to return . . . because of persecution or a well-founded fear of persecution. . . ." 8 U.S.C. § 1101(a)(42) (emphasis added). Obviously, Congress contemplated that aliens could qualify for "refugee" status by producing evidence either that they would be persecuted or that they had a "well-founded fear" of persecution.

Aliens invoking this latter alternative can offer evidence bearing upon their state of mind -- i.e., that they in fact have a "fear of persecution" -- as well as some objective evidence to show that their fear is "well-founded."6/

6/ As the Ninth Circuit recognized, to be "well-founded" there must be "good reason" for

(Footnote Continued)

Unlike those seeking to satisfy the "persecution" test, however, they would not be required to prove that they would, in fact, be persecuted abroad.

(Footnote Continued)

fearing persecution. 767 F.2d at 1453. Since that court properly declined to apply the "well-founded fear" standard to respondent's claims before the Board itself had performed that task, 767 F.2d at 1455, it is not necessary now to define more precisely the test which the Service should use in determining whether a refugee's fear of persecution is "well-founded."

We do, however, note the error of the test the Board enunciated in In re Acosta-Solorzano, Int. Dec. No. 2986 (B.I.A. March 1, 1985). Among the errors made by the Board in that case was its holding that, to qualify as a refugee seeking asylum under Section 208, aliens must "as a practical matter" show, inter alia, that "the persecutor is already aware, or could easily become aware" of their beliefs. (See Petr. Br. 30). Certainly, aliens can have "well-founded" fears of persecution, if they possess the beliefs or characteristics that would subject them to persecution abroad, even if they cannot presently demonstrate that the persecutor either is or could easily become aware of their beliefs or characteristics. For example, a Jew facing deportation to Nazi Germany prior to World War II would have had a "well-founded fear of persecution" even if his religious heritage might not have been easily discovered.

Section 243(h) of the Act is quite different. It provides that an alien shall not be returned to a country "if the Attorney General determines that such alien's life or freedom would be threatened" (emphasis added). Under Section 243(h), the alien's state of mind is entirely irrelevant. As this Court held in INS v. Stevic, 467 U.S. 407 (1984), the test under that section is whether there is a "clear probability" of persecution abroad. Indeed, Stevic rejected the argument that an alien could qualify for an order barring deportation merely by showing a "well-founded fear" of persecution. 467 U.S. at 428.

While the application of a "clear probability" standard to establish "refugee" status might have been appropriate if Congress had insisted that an alien's unwillingness to return be based upon the

fact of persecution, it is clearly inconsistent with the "well-founded fear of persecution" alternative: A "fear" of persecution cannot properly be equated with the "fact" of persecution; a fear can be "well-founded" even if it is not probable that the fear will be realized.7/

B. While this Court has frequently stated that deference should be paid to administrative construction of statutes,

---

7/ Throughout its brief, the Service mischaracterizes the issue in this case as involving a "burden-of-proof" question. (Petr. Br. 8, 10, 19, 28). This case has nothing to do with the burden of proof. We assume that an alien seeking asylum under Section 208 has the same preponderance-of-the-evidence burden that an alien would have in a Section 243(h) proceeding. The issue here, however, is the legal standard which aliens must satisfy in marshalling evidence under Sections 101(a)(42) and 208 to show that they have a "well-founded fear of persecution." The fact that aliens must show by a preponderance of the evidence that they have such a fear by no means indicates, as the Service seemingly suggests, that they must show that it is more likely than not that they would be persecuted abroad.

it has not allowed agencies to disregard the clear language or intent of Congress. As this Court recently held, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." Board of Governors v. Dimension Financial Corp., 106 S. Ct. 681, 686 (1986). "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

Prior to the 1980 amendments to the INA, the Service had adopted a

restrictive view of asylum.[8/] Those amendments modified the definition of "refugee" and added Section 208 to provide for the first time a specific statutory basis for asylum. However, the Service has continued to insist upon its prior narrow view of asylum.

8/ The INS's 1979 regulations required aliens seeking asylum to sustain "the burden of satisfying the Immigration Judge that [they] would be subject to persecution. . . ." 44 Fed. Reg. 21,253, 21,258 (April 10, 1979). In so refusing to incorporate the "well-founded fear" standard into its asylum regulations, the INS offered its "opinion" that the only difference between its "would be persecuted" standard and the "well-founded fear" standard was one of "semantics." Id. at 21,257. To back up that "opinion" the Service noted that "a fear which is illusory, neurotic or paranoid, however sincere, does not meet the requirement that the fear of persecution be well-founded," and observed that satisfaction of the "well-founded fear" standard therefore required the alien to "show good reason why he fears persecution." Id. The Service never explained its conclusion that a "well-founded fear" -- which it admitted could be established by proof of a "good reason" for the fear -- could be viewed as the semantic equivalent of "would be persecuted."

Thus, this Court is not presented with an agency's fresh interpretation of a new and unclear directive of Congress to which it might properly defer. See Udall v. Tallman, 380 U.S. 1, 16 (1965). Instead, this case involves the recalcitrance of an agency that refuses to submit to Congress' resolution of an issue when it conflicts with the agency's prior practice.

C. The Service focuses its analysis solely on the INA's asylum provision, Section 208, and its relationship to the withholding-of-deportation provision, Section 243(h). It ignores the fact that the "well-founded fear" test of Section 101(a)(42) also applies to refugee admissions under Section 207, see Stevic, 467 U.S. at 423 n.18, and adjustment of refugee status under Section 209. Moreover, as this Court noted in Stevic, 467 U.S. at

425, and as the Service concedes (Petr. Br. 12-13), Congress's principal focus in enacting the 1980 amendments to the INA was on refugee admissions. Thus, the definition of that term was adopted with Section 207's purposes in mind. Those policies require a generous construction of the term "refugee." See pp. 42-44, infra.

In defining "refugee" to revise and regularize admission of "refugees" under Section 207, Congress necessarily made comparable changes regarding Section 208, since all "refugees" are allowed to invoke the Attorney General's discretion in seeking asylum under that section. The Service's discomfort with these arrangements does not justify its efforts to narrow Section 208 by forcing the definition of the term "refugee" into a mold which its language will not permit.

D. The Service contends that it would have been "irrational[]" for Congress to have added a "second avenue of relief" in the form of asylum, when there was already available a witholding-of-deportation provision in the statute. (Petr. Br. 12). To avoid this purported irrationality, the INS asks this Court to construe "refugee" as used in Section 208 narrowly, so as to ensure that applications for asylum under that section do not render "superfluous" the withholding-of-deportation remedy. (Id.). Relatedly, the INS argues that asylum under Section 208 was not intended to replace withholding of deportation as the "legal bar" to deportation of aliens facing persecution abroad. (Petr. Br. 12, 16).

These arguments ignore important differences between Sections 208 and 243(h). Establishing "refugee" status by

proving a "well-founded fear of persecution" and then invoking Section 208 is not a legal bar to deportation, since that section merely allows an alien to invoke the Attorney General's discretion to avoid deportation. By contrast, aliens who prove under Section 243(h) that they "would" be persecuted abroad are, as a matter of law, entitled to avoid deportation. Section 208 is thus not an "irrational" or redundant second avenue to the same destination identified in Section 243(h). Instead, it gives those aliens who cannot satisfy the higher burden necessary to obtain mandatory relief under that section an opportunity to qualify as "refugees" who may invoke the Secretary's discretion to avoid deportation.

Silently acknowledging this point, the INS attempts to minimize the significance of the Attorney General's

discretion under Section 208 by pointing out that he has generally not deported aliens who qualify for relief under that section or under Section 243(h) when the latter section was discretionary, except in cases involving fraud or firm resettlement in a third country. (Petr. Br. 20 n.13, 21-22).[9/] However, it is undeniable that the Attorney General has the discretion to deny asylum to refugees. The text of Section 208 could not be clearer, and this Court emphasized the point in Stevic. 467 U.S. at 423 n.18 ("Meeting the definition of 'refugee' . . . does not entitle the alien to asylum -- the decision to grant a particular application rests in

---

9/ This is hardly surprising, given the Service's crabbed reading of "refugee" as requiring proof that the alien will be persecuted.

the discretion of the Attorney General under § 208(a)."). See also infra p. 44.

Moreover, but for the discretionary nature of asylum under Section 208, Section 243(h) would be superfluous, even as Section 208 is interpreted by the Service. As the Service notes (Petr. Br. at 18-20), a grant of asylum under Section 208 confers greater benefits than withholding of deportation under Section 243(h). Thus, no alien would ever apply for withholding of deportation under Section 243(h), were it not for the fact that a grant of asylum under Section 208(a) is discretionary.10/

10/ As this Court noted in Stevic, 467 U.S. 426-27 & n.20, Section 243(h) was amended in 1980 to reflect our international commitment to give effect to Article 33 of the U.N. Convention, which prohibits contracting states from expelling or returning aliens to territories where their lives

(Footnote Continued)

II. THE LEGISLATIVE HISTORY ESTABLISHES THAT THE "WELL-FOUNDED FEAR" STANDARD DOES NOT REQUIRE AN ALIEN TO PROVE A "CLEAR PROBABILITY" OF PERSECUTION.

The legislative history of the 1980 amendments to the INA evidences, in three separate ways, a congressional intent to employ a "reasonable grounds" standard for determining "refugee" status, rather than requiring proof of a likelihood of persecution. First, the definition of "refugee" was based on definitions that had existed in previous domestic legislation for the admission of refugees into the United States, which required only a

---

(Footnote Continued)

or freedom would be threatened. The refugee provisions, however, were intended to implement our commitment under Article 34 of the Convention to facilitate the naturalization of refugees. Unlike Article 33, Article 34 is "precatory and not self-executing," Stevic, 467 U.S. at 428-29 n.22. It accordingly does not require the admission, asylum or naturalization of refugees, but instead permits signatory nations to use their discretion in granting these remedies. See id.

showing that an alien had a "reasonable" or "good" cause or a "rational basis" or "good reason" to fear persecution. Second, the central purpose of the Act -- to revise and regularize admissions of refugees in a manner that affords sufficient flexibility to address the problem of stateless and homeless persons -- can be achieved only by adopting a more generous test for determining "refugee" status than the one advocated here by the INS. Third, the legislative history plainly states that the definition of refugee was to be construed consistently with the same definition in the U.N. Convention, which uses a "reasonable grounds" for fear standard, rather than the "clear probability" of persecution test.

A. The Definition of "Refugee" Has Its Origin in Prior Domestic Law That Required Only a "Reasonable Basis" or "Good Cause" Showing.

The central purpose of the 1980 amendments to the INA was to "establish[] for the first time a comprehensive United States refugee resettlement and assistance policy."[11/] Accordingly, Congress reviewed the 30-year history of refugee statutes to create a more flexible, systematic and humanitarian approach.[12/] To that end, Congress broadened the prior definition of "refugee" to eliminate outmoded ideological and geographical limitations.[13/] As

---

11/ S. Rep. No. 96-256, 96th Cong., 1st Sess. 1 (1979); see H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 1 (1979).

12/ S. Rep. No. 96-256, supra, at 1-4; H.R. Rep. No. 96-608, supra, at 1-5.

13/ S. Rep. No. 96-256, supra, at 1, 4; H.R. Rep. No. 96-608, supra, at 1, 9.

the legislative history establishes, see infra at 41, and the INS concedes (Petr. Br. at 12-13, 27), Congress clearly did not intend to narrow the standard of eligibility under the pre-existing refugee definition.

The precursor statutes from which the 1980 definition of "refugee" was drawn all included the same element of "fear of persecution" now found in Section 101(a)(42). The courts consistently interpreted these prior definitions of "refugee" as requiring only a showing of a reasonable basis for that fear, not an actual likelihood of persecution.

1. The Displaced Persons Act of 1948.

The term "refugee" first appeared in the Displaced Persons Act of 1948, P. L. No. 80-774, 62 Stat. 1009. Enacted after World War II in response to the

plight of persons uprooted by the war, the Act authorized the issuance of visas to "eligible displaced persons," § 3(a), 62 Stat. 1010, defined as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization ["IRO"] and who is the concern of the [IRO]." § 2(b), 62 Stat. 1009. The IRO Constitution, in turn, defined "refugee[s] of concern" as persons who objected to being returned to their native lands because of "fear [of persecution] based on reasonable grounds."[14/]

14/ Refugees were "the concern of" the IRO if, inter alia, they objected to return to their country of origin because of "persecution, or fear based on reasonable grounds of persecution, because of race, religion, nationality or political opinions. . . . " Constitution of the International Refugee Organization, Annex I, part 1, Section A, subsection 1(a)(i), opened for signature December 15, 1946, entered into force for the United States August 20, 1948, 62 Stat. 3037, T.I.A.S. No. 1846.

Section 4 of the Displaced Persons Act also provided for the adjustment of status of some aliens already in the United States who could not return to their country because of "persecution or fear of persecution on account of race, religion, or political opinions." 62 Stat. 1011. This provision thus afforded in 1948 relief comparable to what Section 208 offers today.

The courts consistently interpreted the Displaced Persons Act as requiring only that the refugee have some "reasonable" basis for fear. See Lavdas v. Holland, 139 F. Supp. 514, 515 (E.D. Pa. 1955), aff'd, 235 F.2d 955 (3d Cir. 1956). Thus, from the very beginning, U.S. domestic legislation for relief of refugees was premised on a showing only of reasonable grounds for fear.

2. The Refugee Relief Act of 1953

After the expiration of the Displaced Persons Act, Congress enacted the Refugee Relief Act of 1953, P. L. No. 83-203, 67 Stat. 400, to allow the continued admission of "refugees" into the United States.[15/] This Act altered the previous definition of "refugee" to include

> "any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto . . ." § 2(a), 67 Stat. 400.

Thus, like the 1948 Displaced Persons Act, the 1953 statute used the "fear of persecution" test. It also

---

15/ See S. Rep. No. 629, 83rd Cong., 1st Sess. 1 (1953); H.R. Rep. No. 1069, 83rd Cong., 1st Sess. 1-3 (1953).

retained the prior Act's provision granting relief, in the form of adjustment of resident status, to aliens already within the United States who were unable to return to their countries of origin "because of persecution or fear of persecution on account of race, religion, or political opinion." § 6, 67 Stat. 403. The 1953 Act was extended by the Refugee-Escapee Act of 1957, P. L. No. 85-316, 71 Stat. 639.[16/]

Under the 1948, 1953 and 1957 Acts, judicial and administrative decisions continued to interpret the "fear of persecution" language as requiring only a

---

16/ The 1957 Act defined "refugee" to include aliens who fled from and could not return to communist or Middle Eastern countries "because of persecution or fear of persecution on account of race, religion, or political opinion." § 15(c)(1), 71 Stat. 639, 643.

showing of some reasonable grounds for fear, not an actual probability of persecution. See Fong Foo v. Shaughnessy, 234 F.2d 715, 718 n.2 (2d Cir. 1955) (Frank, J., in chambers):

> "In the administration of the Displaced Persons Act of 1948 . . . and the Refugee Relief Act of 1953, . . . the Attorney General has decided many claims . . . based on fear of persecution. The question in those cases, as described in an [INS] affidavit . . . is whether the displaced person 'has a reasonable basis to fear persecution, whether or not he would actually be persecuted if he returned to his native country.'" (emphasis added). 17/

3. The 1965 Amendments to the INA

In 1965, Congress amended the INA, to create the first permanent

---

17/ See also Mascarin v. Holland, 143 F. Supp. 427, 428 (E.D. Pa. 1956) ("rational basis"); Cheng Fu Sheng v. Barber, 269 F.2d 497, 500 (9th Cir. 1959) ("rational basis").

statutory basis for the admission of refugees. INA Amendments of 1965, P.L. No. 89-236, 79 Stat. 911. Deriving its definition of "refugee" from the 1957 Refugee-Escapee Relief Act,[18/] Congress authorized, in Section 203(a)(7) of the INA, 8 U.S.C. § 1153(a)(7) (1976), the conditional entry of persons fleeing any communist or Middle Eastern country "because of persecution or fear of persecution." § 3, 79 Stat. 911, 913. Like the previous statutes, Section 203(a)(7) also authorized the adjustment of status of such aliens, within specified limits, if they were already in the United States. Id.

18/ See S. Rep. No. 748, 89th Cong., 1st Sess. 16 (1965); see also H. Rep. No. 96-608, 96th Cong., 1st Sess. 3 (1979).

Under Section 203(a)(7), such aliens could be granted conditional entry of adjustment of status, if they could show that they were "persecuted or had good reason to fear persecution." In re Ugricic, 14 I. & N. Dec. 384, 385-86 (1972) (emphasis added). See Stevic, 467 U.S. at 420. This standard, like that under the 1948, 1953 and 1957 Acts, is plainly more generous than the "clear probability" standard urged by the Service here.[19/] Indeed, the Board of Immigration Appeals expressly distinguished the standards in holding that there was "no

---

19/ See In re Kozielczk, 11 I. & N. Dec. 785, 787 (1966) (Polish-Cuban admitted under Section 203(a)(7) based solely on his testimony that he was unwilling to return to Cuba because of his anti-Communist convictions); In re Drachman, 11 I. & N. Dec. 578 (1966) (Polish-Cuban admitted under Section 203(a)(7) based on her statement that she was "unalterably opposed to the Communist government of Castro.").

support in the legislative history [of the 1965 amendment to § 243(h)] for counsel's argument that an alien deportee is required to do no more than meet the standards applied under 203(a)(7) . . . when seeking relief under 243(h)." In re Tan, 12 I. & N. Dec. 564, 569-70 (1967).20/

Thus, under the 1965 Act the Service emphasized the distinction between qualification for refugee status and qualification for withholding of deportation, when it served to restrict the scope of the latter remedy. The distinction is equally valid when, as here, it cuts

---

20/ See also In re Janus and Janek, 12 I. & N. Dec. 866, 876 (1968) ("[W]e are not persuaded that an applicatant for conditional entry under Section 203(a)(7) is in the same legal posture as an applicant for a withholding of deportation under Section 243(h)"). Note, The Right of Asylum Under United States Law, 80 Colum. L. Rev. 1125, 1138 n.87 (1980).

against the Service and requires a recognition that qualification for refugee status under section 208 requires a lesser showing than an application for relief under Section 243(h).

It is thus clear that, beginning with the 1948 Displaced Persons Act, and continuing through the 1965 amendments to the INA, Congress intended that the term "refugee" include all persons who have a reasonable basis for fearing persecution, not merely those who could show a probability of persecution. Since the Service concedes (Petr. Br. 27 & n.21), as the legislative history dictates,[21/] that the

---

21/ See S. Rep. No. 96-256, supra, at 1, 4 (1979); H. Rep. No. 96-608, supra, at 10 ("the new definition . . . regularizes and formalizes the policies and the practices that have been followed in recent years"); 126 Cong. Rec. 3756 (1980) (Statement of Sen. Kennedy).

present definition of "refugee" set forth in the INA was not intended to narrow the standard of eligibility, it is clear that the Service's present position that an alien must show a clear probability of persecution to qualify for refugee status misreads the statute.

B. The INS's Narrow Interpretation of "Refugee" is Inconsistent with the Purpose of the 1980 Amendments to the INA.

Congress' principal purpose in amending the INA in 1980 was to revise and regularize the law concerning admission of refugees.[22/] Consistent with the United States' tradition of "welcoming homeless refugees to our shores," S. Rep. No. 96-256, supra, at 1, the Act adopted a definition

---

22/ S. Rep. No. 96-256, supra, at 1, 3; H.R. Rep. No. 96-608, supra, at 1-5; Stevic, 467 U.S. at 425.

of refugee "that recognizes the plight of homeless people all over the world," id.

The legislative history clearly establishes that Congress intended these revised admissions procedures to be as flexible as possible in order to encompass diverse refugee situations. The new definition of refugee was thought to be "essential . . . to give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." H.R. Rep. No. 96-608, supra, at 9. This and other provisions of the Act advanced the "primary objective . . . of equity and flexibility in our treatment of refugees." 125 Cong. Rec. 35815 (1979)

(Statement of Rep. Holtzman).[23/] Plainly, the Attorney General's flexibility would be reduced, not broadened, and the pool of eligible aliens would be contracted, if, as the Service argues, the Attorney General's authority to admit refugees under Section 207 or grant them asylum under section 208 extends only to aliens who are more likely than not to be singled out for persecution.

The Ninth Circuit's interpretation of "refugee," by contrast, clearly

---

23/ See also S. Rep. No. 96-256, supra, at 4 (new refugee definition afforded "maximum flexibility in responding to the needs of the homeless who are of concern to the United States"); 126 Cong. Rec. 4498 (1980) (remarks of Rep. Holtzman) (new definition provides "flexibility to deal with crises such as the evacuation of Vietnam in 1975 and to respond . . . to situations in countries such as Cuba or Chile today where there are political detainees or prisoners of conscience of special humanitarian concern to the United States").

affords the flexibility Congress intended to incorporate in the Refugee Act of 1980. It does so, moreover, without threatening an uncontrollable influx of refugees into this country. As Congress recognized, "merely because an individual or group of refugees comes within the definition will not guarantee resettlement in the United States." H.R. Rep. No. 96-608, supra, at 10.

C. The U.N. Convention, Upon Which Section 101(a)(42) Was Based, Adopts a "Good Reason" Standard.

As the Service recognizes, Congress intended that the term "well-founded fear" used to define "refugee" be interpreted in conformity with the same language in the U.N. Convention.[24/]

24/ Although the United States is not a party to the U.N. Convention, it is a party to the United

(Footnote Continued)

(Petr. Br. 26-27). The negotiating history of the U.N. Convention's definition of "refugee" establishes that the "well-founded fear" standard was intended to be more generous than the "clear probability" standard the INS proposes.

The preliminary draft of the U.N. Convention was prepared by the Ad Hoc

---

(Footnote Continued)

Nations Protocol Relating to the Status of Refugees, opened for signature January 31, 1967, entered into force for the United States November 1, 1968, 19 U.S.T. 6224, T.I.A.S. No. 6577 (hereinafter "U.N. Protocol"), which modified the U.N. Convention's definition of "refugee" by eliminating geographical and temporal limitations, and required contracting states to apply the Convention's substantive provisions. U.N. Protocol, art. I. As modified by the U.N. Protocol, the U.N. Convention's definition of "refugee" includes, in pertinent part, "any person who -- owing to well-founded fear of being persecuted for reasons of race, religion, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . ." U.N. Convention, art. I; U.N. Protocol, art. I.

Committee on Statelessness and Related Problems of the U.N. Economic and Social Council. The definition of "refugee" that emerged from that committee incorporated the "well-founded fear" test and was, in substance, the definition that was ultimately adopted by the U.N. Convention.

All of the definitions originally proposed to the Ad Hoc Committee used language that clearly reflected a standard more generous than the INS's "clear probability" standard. The United Kingdom initially proposed a "good reason"/"reasonable ground" standard.[25/] The U.K.

25/ Under the first U.K. proposal, the Convention was to apply to "unprotected persons," defined to include:

> "persons who, being outside the territory of the State of which they are nationals, do not enjoy the protection of the State either because that state refuses them protection or

(Footnote Continued)

delegation then revised that proposal to define a refugee as someone with a "well-founded fear of persecution" based on "good and sufficient reasons."[26/] The French delegation proposed a "justifiable fear" standard.[27/] And the standard

---

(Footnote Continued)

> because for good reasons (such as, for example, serious apprehension based on reasonable grounds, of political, racial or religious persecution in the event of their going to that state) they do not desire the protection of that State." United Kingdom: Draft proposal for Article 1, U.N. Doc. E/AC.32/L.2 (1950) (emphasis added).

26/ The U.K.'s revised definition included as a "refugee" a person "who, having left the country of his ordinary residence on account of persecution or well founded fear of persecution . . . does not wish to return to that country for good and sufficient reasons." United Kingdom: Revised draft proposal for Article 1, U.N. Doc. E/AC.32/L.2/rev.1 (1950) (emphasis added).

27/ The French proposal would have included any person:

> "who has left his country of origin and refuses to return thereto owing to a justifiable fear of persecution ... [and for

(Footnote Continued)

suggested by the United States delegation required only a "fear of persecution."[28] In sum, although the formulations varied, the British, French, and United States proposals all focused upon the refugee's "fear" of persecution; none of these

---

(Footnote Continued)

> that reason] is unwilling or unable to claim the protection of the said country." France: Proposal for a Draft Convention, U.N. Doc. E/AC.32/L.3 at 3 (1950) (emphasis added).

28/ The U.S. proposal would have included "any person who is and remains outside his country of nationality or of former habitual residence, because of persecution or fear of persecution on account of race, nationality, religion or political belief" and who belonged to certain specified categories. United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons), U.N. Doc. E/AC.32/L.4 at 1 (1950). Although the U.S. proposal, read literally, would have included persons with purely subjective fears, the U.S. delegate stated that the proposal was based on the IRO Constitution, see Ad Hoc Committee Summary Record of the Fifth Meeting, U.N. Doc. E/AC.32/SR.5 at 3-6 (1950), thus suggesting that the proposal contemplated a "reasonable grounds" standard. See supra at 32-33.

proposals suggested the refugee must prove a "clear probability" of persecution.

After consideration of these proposals, the Ad Hoc Committee arrived at a consensus, and a working group composed of the delegates from France, Israel, the U.K. and the U.S.[29] drafted the definition of "refugee" that, with minor changes not relevant here, was eventually incorporated in the U.N. Convention. That definition employed the "well-founded fear" test in the manner first proposed by the U.K.[30] In its report to the Economic and

---

29/ Ad Hoc Committee Summary Record of the Sixth Meeting, U.N. Doc. E/AC.32/SR.6 at 7-8 (1950).

30/ The definition that emerged from the Ad Hoc Committee read as follows:

> "Any person who: (a) as a result of events in Europe after the outbreak of the Second World War and before 1 July 1950 has well founded fears of being the victim of persecution for

(Footnote Continued)

Social Council, the Committee explained the meaning of this standard as follows:

> "The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecution or can show <u>good</u> <u>reason</u> why he fears persecution." Report of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618, E/AC.32/55 at 11 (1950) (emphasis added).

It is thus clear that the "well-founded fear" language that emerged

---

(Footnote Continued)

> reasons of race, religion, nationality or political opinion, and (b) owing to such fear has left or is outside the country of nationality or if he has no nationality, outside his country of former habitual residence, and (c) owing to such fear is unable or unwilling to avail himself of the protection of the government of his country of nationality." Art. I, Draft Convention, Report of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618, E/AC.32/55 at 4 (1950).

Compare the definition in the U.N. Protocol, <u>supra</u> note 24.

from the Ad Hoc Committee embodies the "good reason" standard adopted by the Ninth Circuit in this case, not the more stringent "clear probability" standard the INS now proposes. The subsequent deliberations of the Ad Hoc Committee, as well as those of the Social Committee and the General Assembly, confirm that the "refugee" definition was understood to require only a showing of "good reason" to fear persecution.[31/] It was never suggested in these deliberations that a fear of persecution could be "well-founded" only if a

---

31/ See, e.g., Social Committee Summary Record of 160th Meeting, U.N. Doc. E/AC 7/SR.160 at 6-7 (1950) (Statements of Mr. Fearnley, delegate of the United Kingdom, and Mr. Henkin, delegate of the United States). See generally Cox, "Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status, 10 Brooklyn J. Int'l L. 333 (1984).

person was more likely than not to be singled out for persecution.

III. THE INS'S ARGUMENTS REGARDING THE LEGISLATIVE HISTORY OF THE 1980 ACT ARE MISCONCEIVED.

A. The Service emphasizes that in 1979, prior to the adoption of Section 208, the INS amended its regulations to equate the standard for seeking asylum with the standard for withholding of deportation. (Petr. Br. 17). The INS argues that in 1979 it "explicitly rejected suggestions, based on the well-founded fear language of the [U.N.] Convention, that the asylum standard should be less demanding than that for withholding." (Id. at 18). Given this administrative position, the INS now argues, "it is inconceivable that Congress could have intended a lower standard for" asylum when it passed the 1980 Act. (Id.).

But Congress took precisely such "inconceivable" action in 1980. It decided to allow all "refugees" to apply for asylum (although it made clear that such applications could be denied in the discretion of the Attorney General). And when Congress in 1980 defined the term "refugee" in Section 101(a)(42) it used the same "well-founded fear" test that the U.N. Convention adopted, but which the INS had rejected in its 1979 asylum regulations. See note 8, supra p. 20.

B. The INS makes several arguments based on the use of the term "asylum" in the legislative history, all of which are offered to show that Congress intended to equate it with provisions incorporating a "clear probability" standard.

First, it contends that the term "asylum" was used as a synonym for withholding of deportation. This assertion is

based in part on an ambiguity in the testimony of two witnesses. (Petr. Br. 16).[32/] However, the same witnesses ultimately made it clear that "asylum" and "withholding" are distinct concepts and should not be confused.[33/]

32/ The Service also cites a Congressional Research Service Study for the proposition that "asylum" was considered the equivalent of "withholding of deportation" (Petr. Br. at 16). However, the term "asylum" appears to have been used in this study to refer to any form of relief given to refugees already in the United States, for after discussing the Attorney General's parole authority, the Study cites Section 243(h) as "[a]n additional provision used to provide asylum to aliens in the United States." The Refugee Act of 1979: Hearings on S. 643 Before the Senate Judiciary Comm., 96th Cong., 1st Sess. 197 (1979). Cf. infra at 56-57 ("asylum" used to refer to relief under Section 203(a)(7)).

33/ See The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Judiciary Comm., 96th Cong. 1st Sess. 170, 184 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International) ("It seems that it shouldn't be necessary to claim asylum through a procedure designed to allow one to withhold

(Footnote Continued)

Second, the INS notes that the term "asylum" was used in the House Report to refer to the Service's 1979 regulations, and suggests that this indicates that Congress intended to enact those regulations. (Petr. Br. 16-18). However, Congress only recognized the existence of the regulations and noted the absence of any statutory basis for them. H.R. Rep. 96-608, supra, at 17 (1979). The only clear statement in the legislative history regarding the relationship of the 1979 asylum regulations to the new statutory provision was Senator Kennedy's observation that the "[p]resent [asylum] regulations and procedures now used by the immigration Service simply do not conform to either the spirit or to the

---

(Footnote Continued)

deportation under 243(h). Those are not necessarily the same questions.") (emphasis added).

new provisions of this Act." 126 Cong. Rec. 3757 (1980) (emphasis added).

Third, the Service relies on two statements in the legislative history to the effect that the Act was not intended to alter the standards for asylum (Petr. Br. 26), suggesting that the "would be persecuted" standard of its 1979 regulations was to be perpetuated. However, the INS ignores the fact that the term "asylum" was previously used to refer to refugee admissions or adjustment of status under former Section 203(a)(7),[34/] neither of

---

34/ See, e.g., Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Judiciary Comm., 96th Cong., 1st Sess. 170 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International) (referring to "the process by which an alien can claim asylum and thereby request admission to the country as a refugee"). See also H.R. Rep. No. 96-608, supra, at 3 (describing previous use of Attorney General's parole

(Footnote Continued)

which required aliens to prove that they "would be persecuted." See pp. 37-40, supra. Indeed, before the enactment of Section 208, the adjustment of status proviso of Section 203(a)(7) offered the form of statutory relief most analogous to asylum; this Court in Stevic in fact used the term "asylum" to refer to relief under that section. 467 U.S. at 416 n.8. Thus, any statements in the legislative history to the effect that the 1980 Act did not alter the standard for "asylum" could well have referred to the prior standard applicable under Section 203(a)(7).35/

(Footnote Continued)

authority under Section 212(d)(5) of the INA to "offer asylum" to refugees).

35/ Additionally, one of the quoted statements is plainly inapposite because it referred to the Senate version of the bill, which, as the government points out (Petr. Br. 15-16 n.10), expressly adopted the withholding-of-deportation

(Footnote Continued)

Finally, this case does not involve construction of the term "asylum" in Section 208. Instead, it involves construction of the term "refugee" as defined in Section 101(a)(42) and used in Sections 207-209. Any possible confusion by Congress in the 1980 legislative history as to the term "asylum" does not justify a misconstruction of the term "refugee," when it applies not only to asylum under Section 208, but also to admissions under Section 207 and adjustment of status under Section 209.

(Footnote Continued)

standard. See S. Rep. No. 96-256, supra, at 9 (1979). This version was rejected in favor of the House version, which adopted the "well-founded fear" standard. The other statement the government cites was made in response to a question by Congressman Fascell regarding Section 203(a)(7). The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 71 (1979).

C. The Service argues that before 1980 there was a uniform judicial and administrative interpretation of the "well-founded fear" standard as being synonymous with the "clear probability" standard and that Congress should be deemed silently to have adopted that interpretation.

The INS relies primarily on this Court's discussion in Stevic of the Post-U.N. Protocol, pre-Refugee Act case-law under Section 243(h). (Petr. Br. 24-25). Stevic, however, establishes only that "the [U.N.] Protocol was the source of some controversy with respect to the standard for Section 243(h) claims for withholding of deportation." 467 U.S. at 420. Moreover, this Court specifically refused to apply a "well-founded fear" test under Section 243(h). 467 U.S. at 425-28.

Stevic did note that, "[a]lthough before In re Dunar [14 I. & N. Dec. 310 (B.I.A. 1973)], the Board and the courts had consistently used a clear-probability or likelihood standard under section 243(h), after that case the phrase 'well-founded fear' was employed in some cases," 467 U.S. at 419. It is these cases on which the Service primarily relies for the proposition that the "the well-founded fear terminology [was used] interchangeably with the clear probability and likelihood language." (Petr. Br. 25). The use of the phrase "well-founded fear" in some pre-1980 Section 243(h) cases, however, falls far short of establishing that the phrase was considered the equivalent of "clear probability" of persecution in those cases.

Most of these cases simply denied withholding of deportation after finding that the alien had failed to prove

a "well-founded fear" of persecution. They stand only for the unexceptionable proposition that the "clear probability" standard of Section 243(h) is at least as stringent as the "well-founded fear" standard. Thus, the aliens' failure to establish a well-founded fear of persecution in those cases, a fortiori, disqualified them from withholding of deportation. The cases thus did not have to decide whether "well-founded fear" was the equivalent of "clear probability," and most did not.[36/]

36/ See, e.g., Fleurinor v. INS, 585 F.2d 129, 132-34 (5th Cir. 1978); Martineau v. INS, 556 F.2d 306, 307 & n.2 (5th Cir. 1977); Henry v. INS, 552 F.2d 130, 131-32 (5th Cir. 1977); Pereira Diaz v. INS, 551 F.2d 1149, 1154 (9th Cir. 1977); Zamora v. INS, 534 F.2d 1055, 1058 (2d Cir. 1976); Paul v. INS, 521 F.2d 194, 200 (5th Cir. 1975); Gena v. INS, 424 F.2d 227, 232 (5th Cir. 1970); In re Williams, 16 I. & N. Dec. 697, 700-02, 704 (B.I.A. 1979); In re François, 15 I. & N. Dec. 534, 539

(Footnote Continued)

A handful of the cases did suggest (in dictum) that the "well-founded fear" and "clear probability" standards were equivalent or substantially similar. See Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977). However, there were conflicting cases which recognized that the two standards were different. See, e.g., Coriolan v. INS, 559 F.2d 993, 997 n.8 (5th Cir. 1977). Moreover, until this Court clarified the point in Stevic, it was not clear that "clear probability" meant "more likely than not," and some cases appear to have interpreted the standard as more lenient. See In re Martinez Romero, Int. Dec. No. 2872 (BIA

(Footnote Continued)

(B.I.A. 1975); In re Mladineo, 14 I. & N. Dec. 591, 592 (B.I.A. 1974); In re Maccaud, 14 I. & N. Dec. 429, 434 (B.I.A. 1973), aff'd, 500 F.2d 355 (2d Cir. 1974); In re Bohmwald, 14 I. & N. Dec. 408, 409 (B.I.A. 1973).

1981) (Section 243(h) requires an alien to demonstrate "realistic likelihood that he, or a class to which he belongs, will be persecuted.").

In sum, prior to 1980 there was no clear consensus that the "well-founded fear" standard was equivalent to the "more likely than not" standard now clearly applicable under Section 243(h). There is no clear indication in the legislative history that Congress intended to ratify those cases which did equate the two standards. Consequently, the Service's ratification argument must fail.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

E. Edward Bruce*
Carol Fortine
Carlos M. Vázquez
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

*Counsel of Record

July 14, 1986